

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

**RANDY OVERBAY v. HOWARD CARLTON, WARDEN and the  
STATE OF TENNESSEE**

**Appeal from the Circuit Court for Johnson County  
No. 4467    Lynn W. Brown, Judge**

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**No. E2004-02772-CCA-R3-HC - Filed June 27, 2005**

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The petitioner, Randy Overbay, appeals from the trial court's order dismissing his petition for writ of habeas corpus. The state has filed a motion requesting that this court affirm the trial court's denial of relief pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. The petition fails to establish a cognizable claim for habeas corpus relief. Accordingly, the state's motion is granted and the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed  
Pursuant to Rule 20, Rules of the Court of Criminal Appeals**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JAMES CURWOOD WITT, JR., JJ., joined.

Randy Overbay, Mountain City, Tennessee, Pro se.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Joe C. Crumley, Jr., District Attorney General, for the appellee, State of Tennessee.

**MEMORANDUM OPINION**

The petitioner was convicted in 1987 by a Sullivan County jury of aggravated rape and aggravated kidnapping. The court sentenced him as a Range II offender to life imprisonment on the aggravated rape conviction and as a Range II offender to forty years on the aggravated kidnapping conviction. The sentences were ordered to be served consecutively to each other and to a prior four-year sentence arising from other charges. On appeal, the judgment was affirmed. See State v. Randy J. Overbay, No. 821 (Tenn. Crim. App. Dec. 7, 1988), app. denied (Tenn. Jul. 3, 1989).

On September 8, 2004, the petitioner filed a petition for writ of habeas corpus in which he asserted that his judgment for his aggravated rape conviction was void. More specifically, he asserted that the trial court was without jurisdiction to set aside his original sentence of forty years for this offense and to enter an amended judgment sentencing him to life imprisonment as a

Range II, especially aggravated offender. The trial court found the state's motion to dismiss to be well-taken and dismissed the petition without a hearing.

In Tennessee, “[a]ny person imprisoned or restrained of his liberty, under any pretense whatsoever, except [those held under federal authority], may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment and restraint.” Church v. State, 987 S.W.2d 855, 857 (Tenn. Crim. App. 1998); Tenn. Code Ann. § 29-21-101. A writ of habeas corpus may be granted only when the petitioner has established lack of jurisdiction for the order of confinement or that he is otherwise entitled to immediate release because of the expiration of his sentence. See Ussery v. Avery, 222 Tenn. 50, 432 S.W.2d 656 (1968); State ex rel. Wade v. Norvell, 1 Tenn. Crim. App. 447, 443 S.W.2d 839 (1969). The burden is on the petitioner to establish that the judgment is void or that the sentence has expired. State ex rel. Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964).

In the present case, the petitioner has not established that he is entitled to habeas corpus relief. His challenged life sentence has not expired, and his petition does not show a void judgment, “one in which the judgment is facially invalid because the court did not have the statutory authority to render such judgment.” Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998). The trial court originally sentenced the defendant to forty years upon his conviction for aggravated rape of the five-year old victim. On direct appeal, the defendant challenged the trial court's subsequently amending the judgment and increasing the sentence for aggravated rape from forty years to life imprisonment, arguing that the trial court was without authority to amend the judgment when the state failed to file notice of intent to seek an enhanced sentence. This court rejected the defendant's argument, observing that certain offenses involving sexual abuse of children were deemed “especially aggravated offenses” with mandatory Range II sentences by statute. State v. Overbay, slip op. at \_\_\_. See also Tenn. Code Ann. §§ 40-35-107(5), (8)(Supp. 1987). Noting that the trial court was without discretion to sentence the defendant other than to a Range II sentence and that the original judgment was properly amended within thirty days of its entry, this court concluded that the trial court was within its authority and jurisdiction to correct the judgment to conform with applicable statutory law. Overbay, slip op. at \_\_\_. Returning to the instant case, the trial court properly dismissed the instant petition for writ of habeas corpus based on the petitioner's failure to establish his claim of a void judgment.

Upon due consideration of the pleadings, the record, and the applicable law, the court concludes that the petitioner has not established a cognizable claim for habeas corpus relief. Accordingly, the state's motion is granted. The judgment of the trial court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals.

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NORMA MCGEE OGLE, JUDGE